

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONSTANCE SCHENK,

Defendant-Appellant.

UNPUBLISHED

July 6, 2006

No. 259087

Oakland Circuit Court

LC No. 2003-191368-FH

Before: Jansen, P.J., and Neff and Zahra, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that defendant was denied the effective assistance of counsel. Rather, I conclude *People v Kelley*, 78 Mich App 769; 260 NW2d 923 (1977) is distinguishable from the instant case, and that defendant failed to establish her claim for ineffective assistance of counsel.

In *Kelley*, the defendant argued that the trial judge erred by failing to properly inform the jury that:

[The d]efendant could not be convicted based on his physical resistance to his arrest unless the jury first found that [the] defendant's actions prior to the arrest amounted to a resisting or obstructing of [the police officer]'s accident investigation, forbidden by the statute under which [the] defendant was charged, and rendering [the] defendant's arrest legal. [*Kelley, supra* at 775.]

Kelley addressed an instructional error of the trial court. Because *Kelley* only addressed errors of the trial court, I would not extend the holding to encompass claims of ineffective assistance of counsel. Further, *Kelley* indicated that "several factors militate towards the conclusion that reversal is required in order to avoid a possible miscarriage of justice." *Kelley, supra* at 778. *Kelley* noted that defense counsel attempted to object to the instructions and that there was the possibility of juror confusion. The *Kelley* court concluded that the "defendant may have suffered a miscarriage of justice [because] . . . there was a substantial likelihood that defendant may have been convicted for his resistance to the arrest." *Id.* at 779.

Here, the parties' respective theories of the case do not indicate that the jury convicted defendant of anything other than obstructing officer Porta before her arrest. The majority admits "the prosecutor consistently presented that his theory of the case was that the offense occurred

when defendant attempted to get around Officer Porta before defendant was arrested.” And while the majority notes that the prosecutor “repeatedly supported his theory with references to defendant’s behavior during and after her arrest,” the majority fails to note that the prosecutor repeatedly stated to the jury that defendant’s behavior while under arrest only established that defendant was not an innocent victim of police abuse. Here, the prosecution presented a narrowly tailored theory directed toward defendant’s obstruction of officer Porta in the process of an arrest. Therefore, because there was no “substantial likelihood” of jury confusion, *Kelley* is distinguishable.

Further, I conclude that defendant failed to establish her claim of ineffective assistance of counsel. It is well settled that trial strategy is the sole province of counsel. This Court should not substitute its judgment for that of counsel in matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001), citing *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Defendant faces a strong presumption that counsel’s conduct was proper. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In terms of trial strategy, defense counsel may strategically decide against requesting a limiting instruction because it could be counter-productive to emphasize the subsequent acts to the jury. See *People v Dermartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973).

In this case, defense counsel heavily relied on events following defendant’s arrest to establish that defendant was a victim of police misconduct. Specifically, that defendant did nothing “to cause her arrest and content[ion] that the injuries she sustained that night were due to police brutality.” The defense’s theory of the case is reflected in defense counsel’s opening statement:

Back to what the evidence will show. Officer Porta gets in [defendant’s] face, attempts to handcuff her and attempts to move from one place to another place by the vehicle and back. My client raises her hand and says, “You didn’t handcuff me” sarcastically. Porta returns to her, handcuffs her, pepper sprays her, takes her to the ground, assaults her, sexually, drags her back to the car, the patrol car, drags her. Puts her in the vehicle, they take her back to the station. She’s, I’m going to say kindly, half undressed. She’s brought into the police station. She’s laughed at, humiliated, embarrassed by not only officer Porta but the other officers in there. Now this is 2:00, 2:30 in the evening—at night. Taken back out of the camera’s view, her shorts pulled up, brought back in and the video starts for us. Okay?

Now, all of this happens. The video runs, she’s taken off camera, no other video available. Then about 30 seconds later on the video you’re going to hear my client scream. Then she’s dragged up by her hair up a flight of stairs and placed in her holding cell. Now, all of this has happened because my client is on the phone and not listening to the officer. Now, that’s what the evidence is going to show.

Defense counsel also stressed that the police officers’ had failed to record events at the crime scene with their patrol car cameras. Further, defense counsel noted the police were able to produce a recording of defendant’s shameful behavior at the police station. From this evidence, defense counsel argued that the police had staged the recordings to conceal their poor treatment

of defendant. Defense counsel could not have presented this argument to the jury had events following her arrest been excluded from jury consideration. Therefore, I would defer to defense counsel's strategy to place the issue of police misconduct before the jury.¹

Further, there is no showing that defense counsel's representation so prejudiced the defendant as to deprive him of a fair trial. "A defendant must affirmatively demonstrate that counsel's performance was . . . so prejudicial as to deprive him of a fair trial." *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Here, even assuming that defense counsel's conduct in not requesting a limiting instruction is below an objective standard of reasonableness, defendant has failed to affirmatively demonstrate that, but for his counsel's performance, the result of the proceedings would have been different. Although defense counsel did not request the limiting instruction, the prosecutor's theory of the case carefully argued that the events leading to defendant's arrest were the focus of the case, and that events following defendant's arrest merely corroborated the police officers' testimony. Indeed, the prosecutor stated in opening statement, that:

"[o]fficer Porta, told Ms. Schenk to stop, and not to approach officer Emmi and that she then attempted to push officer Porta out of the way and in that process, quote, "grazed his chest with her hands or arms" and that he then attempted to place her under arrest for obstructing. Mind you, this is a critical moment because as you'll be evaluating the evidence in this case, you'll be looking back on what the nature or the purpose of the arrest of Ms. Schenk in this case.

The prosecutor also state that "ultimately your decision in this case will be on that moment in time that Officer Porta is placing Ms. Schenk under arrest for obstructing an investigation of a drunk driving." As stated by the majority "the prosecutor consistently presented that his theory of the case was that the offense occurred when defendant attempted to get around Officer Porta before defendant was arrested." Further, the record clearly indicates that defense counsel effectively presented defendant's theory of the case to the jury, which if believed, may have resulted in an acquittal. Clearly, the hung jury in the previous trial with a similar defense and jury instructions indicates as much. Defendant's right to a fair trial was not prejudiced by defense counsel not requesting a limiting instruction. Accordingly, I would affirm defendant's conviction.

/s/ Brian K. Zahra

¹ Notably, a similar argument with similar jury instructions resulted in a hung jury at defendant's previous trial. Because defense counsel apparently followed the previous attorney's trial strategy, I cannot conclude that defense counsel's trial strategy was unsound.